Supreme Court, U. S.
FILED
SEP 28 1979
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

NO. 79-334
October Term, 1979

JOHN G. SWAINSON,
Petitioner,

-VS-

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF FOR RESPONDENT

EDWARD J. GRANT
Prosecuting Attorney
County of Jackson, Michigan
Attorney for Respondent

By: JOHN L. WILDEBOER
Assistant Prosecuting Attorney
300 County Court Bldg.
312 South Jackson
Jackson, Michigan 49201
Telephone: (517) 788-4283

AMERICAN PRINTING COMPANY
125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — (616) 458-5326
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii
QUESTION PRESENTED 1
STATEMENT OF THE CASE 1
ARGUMENT 3
APPENDIX A 1a

INDEX OF AUTHORITIES

Cases: Page

Baker, People v, 7 Michigan App 471; 152 NW2d 43 (1967) 7

Collins, People v, 43 Mich App 259; 204 NW2d 290 (1972) 6

Davis, People v, 53 Mich App 94; 218 NW2d 787, cert den 419 US 1080; 42 L Ed 2d 674 (1974) 7

Eddington, People v, 77 Mich App 177; 258 NW2d 183 (1977) 6

Estes v *Texas*, 381 US 532; 14 L Ed 2d 543; 85 S Ct 1628 (1965) 11, 12

Green, People v, 74 Mich App 351; 253 NW2d 763 (1977) 12

Ernest Green, People v, 405 Mich 273; 274 NW2d 448 (1979) 10

Green, People v, *323 Mich 128; NW2d 142 (1948)* 7

Hawthorne, People v, 293 Mich 15; 291 NW 205 (1940) 12

Irvin v *Dowd*, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961) 5, 6, 11, 12

Nard, People v, 78 Mich App 365; 260 NW2d 98 (1977) 6

Parker, People v, 76 Mich App 432; 257 NW2d 109 (1977) 12

Quimby, People v, 134 Mich 625; 96 NW 1061 (1903) .. 6

Raines, People v, 63 Mich App 498; 234 NW2d 673 (1975) . 6, 7

Rideau v *Louisiana*, 373 US 723; 10 L Ed 2d 663; 83 S Ct 1417 (1963).....11, 12

Schneider, People v, 309 Mich 158; 14 NW2d 819 (1944) 6

Sponick v *Detroit Police Dept*, 49 Mich App 162; 211 NW2d 674 (1973) 8

Stockard, People v, 48 Mich App 680; 211 NW2d 62 (1973) 6

Stroble v *California*, 343 US 181; 96 L Ed 872; 72 S Ct 599 (1952) 11

Swift, People v, 172 Mich 473; 138 NW 662 (1912) 6

Turner v *Louisiana*, 379 US 466; 13 L Ed 2d 424; 85 S Ct 546 (1965)..... 11

INDEX OF AUTHORITIES (CONT'D)

Cases: Page

Whitfield, People v, 58 Mich App 585; 228 NW2d 475 (1975) 7

Statutes:

MCL 257.625; MSA 9.2325 3

MCL 335.341(4)(d); MSA 18.1070(41)(4)(d) 4

MCL 600.8119; MSA 27A.8119 4

QUESTIONS PRESENTED

Is Petitioner entitled to dismissal of pending charges of driving under the influence of intoxicating liquor in the 12th District Court and possession of marijuana in the 13th District Court based on pre-trial publicity arising from the Prosecutor's statement to a newspaper reporter that the marijuana case had been adjourned for Petitioner to consider an offered polygraph exam, which was reported in the newspaper as the Petitioner having agreed to take a polygraph, where there has been no attempt made to select a jury or determine if an impartial jury could be selected, where a year and a half has elapsed since the publicity, and where the 13th District Court has granted a change of venue in the marijuana trial?

STATEMENT OF THE CASE

On November 16, 1977, Petitioner was stopped by two Michigan State Police officers about ten miles from his home. After stopping Petitioner, the officers determined that the Petitioner was intoxicated and arrested him for the offense of driving under the influence of liquor (DUIL). Petitioner was then taken to the Jackson County Jail where he was immediately subjected to a search which turned up a marijuana cigarette. The Petitioner was charged in the 12th District Court with the offense of DUIL and in the 13th District Court with possession of marijuana.

Petitioner's arrrest attracted much attention in the newspapers and on radio and television due to his status as a former Governor of the State and former State Supreme Court Justice. Included in this publicity were portions of interviews Petitioner granted to various reporters. In these interviews, Petitioner acknowledged that he had been drinking before he was stopped but denied that he was driving in an intoxicated condition. Petitioner reported that he has two artificial legs, the result of a World War II injury, and that in getting out of the car he may have stumbled or lurched due to his aritificial legs which may have led the officers to believe that he was intoxicated.

(Petitioner's appendices H, I, J). In these interviews, Petitioner also indicated that he was a consultant for a drug rehabilitation center, that he had been at the center several days prior to being stopped by the officers, and that somebody might have slipped the marijuana cigarette in his pocket to get rid of it. Otherwise, the Petitioner stated that he had no idea how the marijuana got in his pocket. (Petitioner's appendices H, I, J, K). During this early publicity recounted in Petitioner's appendices, no statements are attributed to the prosecutor, and only Lt. Garrison, Commander of the Jackson State Police Post, is attributed with saying that Petitioner was observed driving very slowly and weaving back and forth across the center line, was observed to be intoxicated, and found to be in possession of a marijuana cigarette when he was brought to the jail. Garrison is also attributed with saying that the Petitioner behaved like a perfect gentleman and never tried to use his influence.

The publicity concerning a polygraph examination began on January 11, 1978, and continued up to March 31, 1978 (Petitioner's appendices N, O, R, T). The newspaper accounts indicate that Prosecutor Grant stated that selection of the jury in the marijuana case was adjourned to allow Petitioner to take a lie detector test.

Prosecutor Grant's account of the statement he made to a newspaper reporter indicates that a reporter from the local Jackson paper inquired as to the reason for the adjournment of the marijuana case and was told by Grant that a polygraph had been offered in the marijuana case based on Petitioner's claim of having no knowledge of the substance. The prosecutor stated that he did not indicate to the reporter that Petitioner had agreed to take the polygraph test. (Respondent's appendix A).

Petitioner filed in both the 12th and 13th District Courts separate motions to dismiss the complaints. On March 7, 1978, Judge Biewend of the 12th District Court issued an order denying Petitioner's motion to dismiss the complaint. On March 28, 1978, Judge Justin of the 13th District Court entered an order denying Petitioner's motion to dismiss the complaint but, at the

same time, granted Petitioner's motion for change of venue. On April 11, 1978, Petitioner filed an application for leave to appeal to the Circuit Court for the County of Jackson from the orders denying Petitioner's motion to dismiss the charges in the 12th and 13th District Courts.

On May 30, 1978, Judge Noble of the Circuit Court for the County of Jackson issued an order denying Petitioner's application for leave to appeal in each case.

Petitioner made application for leave to appeal to the Michigan Court of Appeals and by an order certified July 28, 1978, the Court of Appeals denied Petitioner's application.

Petitioner then made application for leave to appeal to the Michigan Supreme Court and that Court by an order certified April 6, 1979 denied Petitioner's application for leave to appeal. Petitioner applied for rehearing before the Michigan Supreme Court and by an order certified June 5, 1979 the Michigan Supreme Court denied Petitioner's motion for rehearing.

ARGUMENT

THE DISMISSAL OF CHARGES BASED ON PRE-TRIAL PUBLICITY IS AN IMPROPER REMEDY WHEN THERE HAS BEEN NO ATTEMPT TO SELECT A JURY OR TO DETERMINE THE TAINT TO PROSPECTIVE JURORS. IMPROPER PUBLICITY DUE TO A PROSECUTOR'S STATEMENT HAS NOT BEEN RECOGNIZED AS CALLING FOR THE REMEDY OF DISMISSAL; RATHER, AN ATTEMPT TO SELECT AN IMPARTIAL JURY IS STILL REQUIRED BEFORE ANY FURTHER REMEDY IS TO BE CONSIDERED.

INTRODUCTION

Petitioner presently has pending a driving under the influence of intoxicating liquor (DUIL) charge, MCL 257.625; MSA 9.2325, in 12th District Court and a possession of marijuana

charge, MCL 335.341(4)(d); MSA 18.1070(41)(4)(d), in the 13th District Court. The 13th District Court consists of the City of Jackson, and the 12th District consists of the County of Jackson except the City of Jackson, MCL 600.8119; MSA 27A.8119. The Petitioner was initially arrested for the offense of DUIL in the County of Jackson with venue laid in the 12th District Court. The Petitioner was then taken by the arresting officers to the Jackson County Jail, located in the City of Jackson, where he was to have been lodged. At the jail, the Petitioner was searched, and a marijuana cigarette was found in his coat pocket. Thus, venue for the possession of marijuana charge was laid in the 13th District Court.

Petitioner, on appeal to the Fourth Judicial Circuit Court of Michigan, the Michigan Court of Appeals and the Michigan Supreme Court, and in his petition for writ of certiorari, has pursued an appeal from the 12th District Court and the 13th District Court on a consolidated basis, and addressed the issues as if there were only one proceeding against the Petitioner. Due to the substantial difference in the two different charges pending against the Petitioner in the two different District Courts, the different impact which the pre-trial publicity would have on the two charges, and the different remedies sought and relief obtained by the Petitioner in the different District Courts, this Court must recognize that it is faced with two distinct issues, the resolution of each dependent on the facts and circumstances of each case.

Petitioner initially brought a motion to dismiss the complaint both in the marijuana case in 13th District Court and the DUIL case in 12th District Court. Petitioner cited pre-trial publicity of two natures as the basis for his motions to dismiss in District Court. The first consists of newspaper and radio publicity concerning the charges which is attributable to the Petitioner's status as a public figure. The second form of publicity concerns newspaper reports that the Petitioner was to submit to a polygraph test on the marijuana case in the 13th District Court, and later reports that the Petitioner had not submitted to the test and that the prosecutor would go ahead

and try the Petitioner on the marijuana charge if he would not submit to the polygraph.

Petitioner's motion to dismiss was denied by the 12th District Court on March 7, 1978 and by the 13th District Court on March 28, 1978. Petitioner also brought a motion for change of venue in 13th District Court which was granted by that Court on March 28, 1978. Petitioner has not moved for a change of venue in 12th District Court.

THE REMEDY OF DISMISSAL FOR PRE-TRIAL PUBLICITY IS NOT AVAILABLE.

It is Petitioner's assertion that due to the nature of the publicity, it would be impossible to impanel an impartial jury and, therefore, the charges against him must be dismissed.

Petitioner has been unable to cite any case in which the remedy for pre-trial, or trial publicity, was to dismiss the charge against the defendant, regardless of the source of that publicity. Research by the undersigned has also failed to uncover a case where the remedy of dismissal for pre-trial publicity was used, suggested or approved.

The Respondent realizes that there has been far greater publicity in the instant case than normally attends a DUIL or possession of marijuana trial. The Respondent also realizes that it is conceivable that some of this publicity may result in potential jurors forming an impression or an opinion of the case. Beyond this point, however, assertions concerning the exact nature of the impact of this publicity on prospective jurors, such as the Petitioner has engaged in, amounts to pure speculation. It has been repeatedly held that a juror's knowledge of the case, or formation of an opinion concerning the case, is not sufficient to disqualify the juror. In *Irvin* v *Dowd*, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961), this Court stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a

> prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

This same principle has been recognized in Michigan courts. *People* v *Quimby*, 134 Mich 625; 96 NW 1061 (1903), *People* v *Raines*, 63 Mich App 498; 234 NW2d 673 (1975).

Petitioner has also failed to make any showing that this case involves strong community feeling or bias as a result of the publicity which would inherently taint the jury selection process. Without such a showing, a change of venue, much less a dismissal, is not warranted. *Irvin* v *Dowd*, supra, *People* v *Schneider*, 309 Mich 158; 14 NW2d 819 (1944).

The procedure accepted by Michigan appellate courts as the better rule where there is a question of the necessity of a change of venue due to pre-trial publicity is to reserve a decision on the issue of change of venue until an attempt has been made to obtain a fair and impartial jury. *People* v *Schneider*, supra, *People* v *Swift*, 172 Mich 473; 138 NW 662 (1912); *People* v *Eddington*, 77 Mich App 177; 258 NW2d 183 (1977). To shield prospective jurors who have not been exposed to the polygraph publicity from mention or discussion of that subject on *voir dire* of other jurors, the trial court could *voir dire* prospective jurors individually. *People* v *Collins*, 43 Mich App 259; 204 NW2d 290 (1972). Another alternative remedy short of an attempt to select an impartial jury would be to hold an evidentiary hearing to determine the extent and nature of any prejudice arising from the pre-trial publicity. *People* v *Nard*, 78 Mich App 365; 260 NW2d 98 (1977), *People* v *Stockard*, 48 Mich App 680; 211 NW2d 62 (1973).

PUBLICITY CONCERNING A POLYGRAPH EXAMINATION DOES NOT BAR SELECTION OF A JURY.

Petitioner's assertions that it would be impossible to select an impartial jury due to the prejudice caused by publicity concerning a polygraph examination and an increase in the prejudice if the Petitioner had to *voir dire* prospective jurors on the issue of the polygraph examination is unfounded. In the first instance, it should be noted that the publicity surrounding the polygraph examination has been made in connection with the marijuana case in 13th District Court, and not the DUIL case in 12th District Court. As concerns the DUIL case in 12th District Court, if a prospective juror had been exposed to the publicity concerning the polygraph examination, that juror could certainly be educated that a charge of DUIL involves the physical capacity of an individual to operate a motor vehicle, and the submission to a polygraph test on a DUIL charge could serve absolutely no purpose. This distinction does not call for a juror of uncommon sophistication. If, during *voir dire* the trial court should determine that the prospective jurors could not separate the DUIL charge from the publicity concerning a polygraph in the connected charge in 13th District Court, then it would be his place to find that an unprejudiced jury could not be impaneled in Jackson County. It would be premature for this Court to make that determination without any evidence of record to support such a determination.

As concerns the possession of marijuana charge in 13th District Court, the Respondent asserts that inquiry during *voir dire* regarding a juror's exposure to publicity concerning a polygraph would not so anathematize the proceedings as to prevent the selection of a jury. Exposure of a jury to mention of a polygraph examination in connection with pending criminal charges does not automatically result in prejudice. It has been recognized that a jury can, to a certain extent, be exposed to information of this nature, without violating the defendant's right to due process of law. *People* v *Green*, 74 Mich App 351; 253 NW2d 763 (1977), *People* v *Raines*, supra, *People* v *Whitfield*, 58 Mich App 585; 228 NW2d 475 (1975), *People* v *Davis*, 53 Mich App 94; 218 NW2d 787, cert den 419 US 1080; 95 S Ct 670; 42 L Ed 2d 674 (1974), *People* v *Baker*, 7 Mich App 471; 152 NW2d 43 (1967). It cannot be assumed that a juror would be unable to render an impartial verdict merely because he was questioned concerning his exposure to publicity about a polyg-

raph examination. It remains within the discretion of the trial court to determine whether the *voir dire* concerning the polygraph has such an impact on potential jurors as to impair the jurors' fair and independent judgment.

The Petitioner's sought after remedy of outright dismissal based on pre-trial publicity is of necessity dependent on the premises that mention of a polygraph to prospective jurors is so inflammatory as to render jurors incapable of arriving at an impartial verdict thereafter, and that jurors accept without reservation the accuracy of polygraph examination results and believe that refusal to submit to a polygraph constitutes an admission of guilt. Respondent contends that Petitioner's portrayal of the impact on a juror of the polygraph publicity has been vastly overstated, but again notes that an accurate determination of this impact on the jurors in the 13th Judicial District of Michigan can only be made in a survey of those jurors, either on *voir dire* or at an evidentiary hearing.

At least one panel of the Michigan Court of Appeals has accepted the view that knowledge of a polygraph examination is not so overwhelming as to prevent a factfinder from making its own independent determination of a witness's credibility. The Michigan Court of Appeals in *Sponick* v *Detroit Police Dept*, 49 Mich App 162; 211 NW2d 674 (1973) considered the introduction into evidence, on the police officer's motion, of the results of a polygraph examination at the police officer's hearings before a Detroit Police Department trial board. In addressing the police officer's contentions that the trial board's findings were arbitrary since they were contrary to the results of the polygraph examinations, the Court of Appeals stated:

> The results of a polygraph examination are, in reality, the examiner's expert opinion as to the veracity of the individual examined by him. * * * It cannot be seriously claimed that non-experts are incompetent to judge veracity or credibility. Our jury system is grounded on the principle that all unbiased adults are competent to judge credibility. Therefore, the members of appellants' trial boards, although not polygraph experts, were competent, having heard all the testimony and seen appellants testify, to interpose their own conclusions of appellants' credibility against the opinions of the polygraph experts who testified for appellants. Accordingly . . . it is our conclusion that appellants' trial boards did not act arbitrarily and capriciously . . . when they chose not to accept as conclusive the results of polygraph examinations to which appellants submitted. (49 Mich App at 190-191; 211 NW2d at 687).

It is not inconceivable that the District Courts in surveying veniremen would find some who share Senator Ervin's view of the polygraph as modern day witchcraft. Such a juror, rather than being swept away by the publicity may view newspaper accounts of the prosecutor's offer of a polygraph test as heavy handed badgering of the defendant and take a jaundiced view of the entire prosecution. Without attempting to seat a jury, this position remains as speculative as Petitioner's presumption of prejudice, yet does serve to illustrate the possibility of a not unsizeable portion of prospective jurors possessing a healthy distrust of the efficacy of a polygraph examination and those, regardless of their view of the polygraph, capable of reaching an independent conclusion of a witness's veracity and credibility.

THE PROSECUTOR'S MENTION OF A POLYGRAPH DOES NOT CHANGE THE AVAILABLE RELIEF.

Petitioner intimates that the extremely unusual remedy of dismissal based on pre-trial publicity should be warranted since it was the Respondent who was named in the newspapers as the source of information that the Petitioner was intending to submit a polygraph examination. Petitioner suggests that if these newspaper accounts were accurate the Respondent would have violated Disciplinary Rule 7-107 of the Michigan Code of Professional Responsibility Concerning Trial Publicity and, thus, a new type of exclusionary rule should be formed based on the Respondent's breach of the code of professional responsibility. The Michigan Supreme Court has expressly

rejected this argument. In *People* v *Ernest Green*, 405 Mich 273; 274 NW2d 448 (1979) the Michigan Supreme Court noted:

> This argument rests upon a basic misconception of the code of professional responsibility. The provisions of the code are not constitutional or statutory rights guaranteed to individual persons. They are instead self imposed internal regulations prescribing the standards of conduct for members of the bar.
>
> * * *
>
> Few courts have mixed the standard of conduct found in DR 7-104(A)(1) or any other provision of a code of professional responsibility into questions concerning the admissibility of evidence in criminal or civil cases. Even the courts which have embraced this novel concept have linked their decisions to do so with constitutional doctrines or statutory provisions not recognized or present in Michigan jurisprudence. See, for example, *People* v *Hobson*, 39 NY2d 479; 348 NW2d 894; 384 NYS2d 419 (1976). (405 Mich at 293, 294; 274 NW2d at 454).

Thus, the question of an attorneys' conduct, and the remedy for pre-trial publicity remain distinct issues. The fact that the Respondent added to the publicity already attendant to this case does not alter or add to the well established remedies available to avoid prejudice from pre-trial publicity. The creation of the novel remedy of dismissal before any attempt to select a jury would of necessity be based on equitable grounds. Petitioner, however, due to the favorable publicity he created for himself in his interviews with the press has not come into court with clean hands and should not be entitled to the unprecedented relief requested.

PETITIONER'S SPECULATIVE POSSIBILITY OF PREJUDICE DOES NOT OUTWEIGH INDICATIONS THAT A FAIR AND IMPARTIAL JURY CAN BE SELECTED.

The Petitioner's assertion that the mere possibility of prejudice from pre-trial publicity should warrant dismissal is erroneous. The Petitioner cites *Estes* v *Texas*, 381 US 532; 14 L Ed 2d 543; 85 S Ct 1628 (1965) for this proposition. The Supreme Court in *Estes*, however, notes that the "no prejudice" rule is applied only in extremely unusual situations. The Court refers to the general rule found in *Irvin* v *Dowd*, supra, and *Stroble* v *California*, 343 US 181; 96 L Ed 872; 72 S Ct 599 (1952), where a careful examination of the facts was made to determine whether prejudice actually resulted from trial publicity. The narrow holding of the *Estes* decision is that the defendant was deprived due process of law by the televising and broadcasting of his trial. In so holding, the Supreme Court noted:

> Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. (381 US at 544, 14 L Ed 2d at 551).

Estes holds that most cases involving a claim of deprivation of due process require a showing of identifiable prejudice to the accused. Only where a procedure used involves such a probability that prejudice will result is it deemed inherently lacking in due process. Similar cases are *Rideau* v *Louisiana*, 373 US 723; 10 L Ed 2d 663; 83 S Ct 1417 (1963), which involve the televising of the defendant in the act of confessing to a crime and *Turner* v *Louisiana*, 379 US 466; 13 L Ed 2d 424; 85 S Ct 546 (1965), where deputy sheriffs who were witnesses in the trial were also assigned duty as keepers of the jury. In the instant case, the publicity surrounding the charges is not of such a nature as to render any trial inherently lacking in due process.

In *Irvin* v *Dowd*, supra, this Court noted a deep and bitter prejudice present throughout the community as reflected in the *voir dire* examination of the jurors finally selected. The instant case, however, has not progressed far enough to be comparable to *Irvin* v *Dowd*, supra, since there has been no determination of the actual impact of publicity on prospective jurors. In any event, the remedy resorted to in *Estes*, *Rideau* and *Irvin* was a change of venue, and not an outright dismissal of charges as urged by the Petitioner in the instant case.

The Michigan Court of Appeals in ruling on a case where a number of impaneled jurors were exposed to prejudicial newspapers articles set down the appropriate rule for the instant case when it stated:

> . . . .a showing of mere potential for prejudice is insufficient to warrant granting a mistrial. (76 Mich App at 408)

People v *Parker*, 76 Mich App 432; 257 NW2d 109 (1977). See also *People* v *Green*, 323 Mich 128; 35 NW2d 142 (1948), *People* v *Hawthorne*, 293 Mich 15; 291 NW 205 (1940). That rule, applicable to impaneled jurors, would also be applicable to prospective jurors in the instant case.

Finally, Petitioner recognizes at page thirty-one of his petition that a change of venue or a continuance are available remedies for pre-trial publicity. It should be noted that appendices G through O and R and T which are newspaper accounts concerning the instant case, span the dates of November 16, 1977 to June 11, 1978. Those articles containing some mention of the polygraph examination span January 18, 1978 through March 31, 1978. (Petitioner's appendices N, O, R, T). Thus, one remedy has already been created by Petitioner's interlocutory appeal. One year and ten months have now elapsed since Petitioner's arrest. One year and six months have now elapsed since the newspapers last concerned themselves with mention of the polygraph. Further, it must be noted from Petitioner's appendices that the publicity concerning the polygraph, and the publicity preceding mention of the polygraph, include several exculpatory statements made by the Petitioner to newspaper reporters, and statements by Petitioner's attorney that there had never been an agreement to take a polygraph test. Thus, the newspaper articles presented in Petitioner's appendices are not entirely adverse or prejudicial. Some of the publicity can be seen as having a favorable impact on jurors, and Petitioner's published comments can be seen as tempering the suggestion in earlier articles that Petitioner agreed to, but then backed out of a polygraph exam.

Thus, the favorable aspects of the publicity, the lapse of time which has not occured since the main body of publicity, and the change of venue already granted by the 13th District Court in the marijuana case all support the assertion that an impartial and unbiased jury can be selected at this date.

CONCLUSION

For the foregoing reasons the Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

EDWARD J. GRANT
Prosecuting Attorney
Jackson County, Michigan
Attorney for Respondent

By: (s) JOHN L. WILDEBOER
Assistant Prosecuting Attorney
300 County Court Building
312 South Jackson Street
Jackson, Michigan 49201
Telephone: (517) 788-4283

Dated: September 14, 1979

APPENDIX A

Answer to Motion to Dismiss Indictment

STATE OF MICHIGAN
IN THE DISTRICT COURT
FOR THE COUNTY OF JACKSON

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-VS- File No.

JOHN G. SWAINSON,
Defendant.

Edward J. Grant (P14272)
Attorney for Plaintiff

John H. Schomer (P20051)
Attorney for Defendant

ANSWER TO MOTION TO DISMISS INDICTMENT

NOW COMES Edward J. Grant, Prosecuting Attorney for the County of Jackson, State of Michigan, and in Answer to Defendant's Motion To Dismiss Indictment states:

1. When approached for an adjournment of the marihuana case scheduled before the 13th District Court, the Prosecutor stipulated thereto based in large part upon the agreement that Defendant would consider taking a polygraph test concerning knowledge of the marihuana found in his pants pocket. Defendant's position as reported in the newspapers being that he was unaware that this item was in his pocket.

2. A reporter from the Citizen Patriot inquired as to the reason for the adjournment and was informed that a polygraph had been offered in the marihuana case based upon Defendant's claim of having no knowledge of the substance. It was

not indicated that Defendant would take the offered polygraph as no answer had been received at that time. After the story was published, the answer was received by the Defendant. The refusal was not communicated to the reporter.

3. The effect of the newspaper articles and other media coverage, which obviously from a reading of exhibits attached to Defendant's Motion included several statements from the Defendant including the statement that he was refused a breathalyzer test, have not been shown to irremediably deny Defendant due process or the right to a presumption of innocence or a fair trial before an impartial jury. No jury has yet been attempted to be picked in either cases pending. The reports appeared some time ago and many potential jurors in all probability will not remember what, if anything, they read or will be able to base their verdict solely upon the testimony given in court.

4. An additional consideration would of course be for a change of venue if an impartial jury could not be selected in these matters.

5. Additionally, it is quite clear from the exhibits that any polygraph examination would only affect the marihuana charge and would have nothing to do with the DUIL charge. The only comments concerning the DUIL have been made by the Defendant, some being highly predjudicial to the Plaintiff. Defendant should not be allowed to benefit from his own statements to the media by now claiming because of such publicity he cannot obtain a fair trial.

WHEREFORE, Plaintiff respectfully moves this Honorable Court to deny Defendant's Motion To Dismiss Indictment.

Respectfully submitted,
(s) EDWARD J. GRANT
Prosecuting Attorney
300 County Courthouse
Jackson, Michigan 49201

Dated: March 3, 1978